(3)

No. 09-1445

In the Supreme Court of the United States

JOSEFINA VILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was exempt from a mandatory consecutive five-year sentence under 18 U.S.C. 924(c)(1)(A)(i) for possessing a firearm in furtherance of a drug trafficking crime because she also faced a ten-year mandatory minimum sentence for the underlying drug trafficking crime.

2. Whether a traffic stop was unconstitutionally prolonged when a police officer detained the driver and passenger to await the arrival of a canine search after the officer developed reasonable suspicion that occupants were engaged in illegal activity.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Berkemer v *McCarty*, 468 U S 420 (1984) 9
Illinois v. *Caballes*, 543 U.S. 405 (2005) 9
United States v *Brigham*, 382 F.3d 500 (5th Cir. 2004) 9
United States v. *Chavez Loya*, 528 F 3d 546 (8th Cir. 2008) 9
United States v. *Elliott*, 107 F 3d 810 (10th Cir. 1997) 5
United States v. *Garrido-Santana*, 360 F.3d 565 (6th Cir.), cert denied, 542 U.S. 945 (2004) 9
United States v. *Holt*, 264 F.3d 1215 (10th Cir. 2001) 5
United States v *Pruitt*, 174 F.3d 1215 (11th Cir. 1999) 10
United States v. *Sanchez-Pena*, 336 F 3d 431 (5th Cir. 2003) 9
United States v. *Ward*, 484 F.3d 1059 (8th Cir. 2007) 9
United States v. *Williams*, 271 F.3d 1262 (10th Cir. 2001), cert. denied, 535 U.S. 1019 (2002) 9

Constitution and statutes:

U.S. Const. Amend IV 5, 8, 9

Statutes—Continued: Page

18 U.S.C. 924(c) 2, 4, 5, 7, 8, 11
18 U.S C. 924(c)(1)(A) 4, 11
21 U.S.C. 841(a)(1) 1, 4
21 U.S.C. 841(b)(1)(A)(viii) 1, 4

In the Supreme Court of the United States

No. 09-1445

JOSEFINA VILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 589 F.3d 1334.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2009. On March 15, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 28, 2010. The petition was filed on May 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of possessing with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C.

841(a)(1) and (b)(1)(A)(viii); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c). Pet. App. 2. The district court sentenced petitioner to 15 years of imprisonment. *Id.* at 24. The court of appeals affirmed. *Id* at 1-22.

1. On the morning of December 6, 2006, Trooper McKay of the Wyoming Highway Patrol stopped a car that was speeding on a highway near Cheyenne. Petitioner was the driver. Angela Davis sat in the front passenger seat. Petitioner and Davis told the trooper that they were driving to Minnesota to visit family. The trooper noticed two cellular telephones in the front console and two small duffle bags in the backseat. He observed that petitioner was acting nervously and that Davis was acting overly friendly. Pet. App. 2-3.

Upon the trooper's request, petitioner provided her license, registration, and insurance. The trooper noticed that petitioner's license listed a California address, the registration and insurance listed two different Nevada addresses, and the car had been registered and insured just two weeks before. The trooper ran petitioner's information through dispatch, and it came back clear. Pet. App. 3.

The trooper then asked petitioner to join him in his patrol car to clarify some questions. In the car, the trooper asked petitioner questions as he filled out a warning ticket. In response to the questions, petitioner said that she lived in California but that the car was registered in Nevada because her boyfriend lived there. She said she and Davis were driving to Minnesota to visit Davis's family. She was unable, however, to tell the trooper what city in Minnesota they were traveling to. After the trooper finished writing the ticket, he re-

turned the license, registration, and insurance to petitioner and told her she was free to go. Pet. App. 3.

As petitioner was getting out of the patrol car, the trooper requested permission to ask her a few more questions. Petitioner agreed and remained in the car. The trooper asked again to which city in Minnesota the women were traveling. Petitioner stated that she did not know because she had just woken up, but that they were planning to stay in Minnesota for two days. The trooper said that it seemed like a long trip to make for a two-day visit. Petitioner responded that she might fly back to California, apparently leaving the car in Minnesota. Pet. App. 3-4.

The trooper asked petitioner to stay in the patrol car while he went back to the car to question Davis about the women's travel plans. Petitioner nonetheless followed the trooper out of the patrol car. In response to Trooper McKay's questions, Davis said she was going to Minnesota to visit family, and that she too might fly back to California. Davis also stated that she and petitioner were related and were going to visit their family. The trooper asked Davis how well she knew petitioner, and Davis responded, "like most families do. We just hang around a little bit." Pet. App. 4.

The trooper asked petitioner for consent to search the car, and petitioner refused. The trooper then detained the women for about eleven minutes until a K-9 unit arrived to conduct a sniff search of the vehicle. The dog alerted to the presence of drugs, and a subsequent search of the car revealed two packages of methamphetamine. Pet. App. 4.

The trooper arrested the two women and put them in the back of his patrol car. While there, Davis hid a gun that she was carrying in her pants in the back seat of the

patrol car. According to Davis, who testified for the government at petitioner's trial, petitioner's brother had given the women the gun for protection during their trip. During the drive, petitioner had carried the gun in her boot or kept it in the center console of the car, but when the trooper pulled the car over, petitioner told Davis to put the gun in her pants. The trooper found the gun in the back of his patrol car about two months after the arrest. Pet. App. 5.

2. A federal grand jury returned an indictment charging petitioner with possessing with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); and possessing a firearm in furtherance of that drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Superseding Indictment, Docket entry No. 84 (March 21, 2008). Petitioner filed a motion to suppress the evidence seized as a result of the traffic stop and ensuing search. The district court denied the motion, Pet. App. 63-72, and a jury found petitioner guilty on both counts. *Id.* at 5.

At sentencing, petitioner argued that the language of 18 U.S.C. 924(c) exempted her from a minimum consecutive term of imprisonment for violating that statute. Section 924(c)(1)(A) provides that a defendant who violates that statute must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Petitioner argued that, under the "except" clause, she could not receive a five-year term of imprisonment for violating Section 924(c) because she faced a higher minimum sentence (ten years) for the drug trafficking offense underlying that conviction (possession

with intent to distribute 500 grams or more of methamphetamine). The district court rejected petitioner's argument and sentenced her to ten years in prison for the drug trafficking offense and a consecutive five years in prison for the Section 924(c) conviction. Pet. App. 35-39, 44-49.

3. The court of appeals affirmed.

a. The court first held that the traffic stop and subsequent search did not violate the Fourth Amendment. The court explained that "[t]he touchstone under the Fourth Amendment is reasonableness," and that under Tenth Circuit precedent "[t]he reasonableness of a traffic stop is examined under a two-part test." Pet. App. 6. First, the court looks to "whether the officer's action was justified at its inception." *Ibid.* Second, the court looks to "whether the officer's action during the stop was 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid.* (quoting *United States* v. *Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001) (en banc)).

With regard to the first inquiry, the court noted that petitioner did not dispute that the traffic stop was justified at its inception, because petitioner was speeding. Pet. App. 6. The court then turned to the second inquiry, explaining that "[a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Id.* at 6-7 (quoting *United States* v. *Elliott*, 107 F 3d 810, 813 (10th Cir. 1997)). In addition, the court of appeals stated, while performing those functions, an officer ordinarily may ask questions relating to a driver's travel plans "so long as they do not prolong the stop." *Id.* at 7. It was therefore reasonable for the trooper to ask petitioner about her travel plans while

he wrote out the warning ticket, the court concluded, and in light of petitioner's license, insurance, and registration each containing different addresses, it was also reasonable for the trooper to ask petitioner to come to the patrol car and clarify which address to write on the ticket. *Ibid.*

The court then concluded that after the trooper finished writing the warning ticket and told petitioner she was free to leave, petitioner consented to answer additional questions. The court explained that "an officer must allow the driver to leave once the initial justification for a traffic stop has concluded," but "[a]dditional questioning unrelated to the traffic stop is permissible if the detention becomes a consensual encounter." Pet. App. 8 (internal quotation marks and citations omitted). The court concluded that petitioner voluntarily consented to additional questioning because a reasonable person would have believed that she was free to leave or refuse to give the trooper any more information. *Id.* at 8-10.

Next, the court concluded that once the trooper finished the consensual questioning of petitioner, he had "specific, articulable facts which reasonably supported his belief that [petitioner's] trip was for an illicit purpose and thus justified her continued detention" while the trooper questioned Davis. Pet. App. 10-11. The court explained that, in addition to appearing nervous, petitioner had made several inconsistent and unusual statements. She had said that she and Davis were going to visit family, then later clarified that they were visiting Davis's family; that she did not know what city they were driving to, even though she was driving the car; that she did not know their destination because she had just woken up; that she and Davis were driving all the

way from California to Minnesota for only a two-day visit; and that she might leave her newly purchased car in Minnesota and fly back to California. *Ibid.*

Finally, the court concluded that after the trooper questioned Davis he had reasonable suspicion justifying detention of petitioner and Davis while he called for a K-9 unit to search the car. In addition to petitioner's statements and nervous appearance, Davis made statements that further supported the trooper's reasonable suspicion. Davis said, for example, that—in contrast to the information petitioner provided—she and petitioner were related and were traveling to visit "their" family in Minnesota. She also said that she might fly back to California, which would have meant that both she and petitioner would have left the car in Minnesota. Pet. App. 11.

b. The court of appeals also held that the prefatory "except" clause of 18 U.S.C. 924(c) did not exempt petitioner from a consecutive five-year term of imprisonment for violating that statute. Pet. App. 14-21. The court explained that the "except" clause "refers to 'a greater minimum sentence . . . provided by . . . any other provision of law'" but "does not say a 'greater minimum sentence' *for what*." *Id.* at 16 (citation omitted). The court noted, however, that the clause "must have *some* understood referent to be intelligible." *Ibid.* (internal quotation marks and citations omitted). The court held that the clause referred to a minimum sentence for the defendant's Section 924(c) offense, not a "minimum sentence for the predicate crime underlying the [Section] 924(c) conviction." *Id.* at 16-18. The court found this conclusion compelled by the language of Section 924(c), the statutory context of the "except" clause, and the absurd results that would follow from the inter-

pretation urged by petitioner. *Id.* at 17-21. The court of appeals accordingly "join[ed] the majority of courts to have addressed the issue and conclude[d] the most natural reading of [Section] 924(c) is that its prefatory clause refers only to a minimum sentence provided by [Section] 924(c) or any other statutory provision that proscribes the conduct set forth in [Section] 924(c)." *Id.* at 21.*

ARGUMENT

Petitioner argues that the court of appeals incorrectly concluded that the traffic stop complied with the Fourth Amendment, and that its decision implicates a conflict between the courts of appeals. She also argues that the court of appeals incorrectly interpreted Section 924(c). Petitioner's Fourth Amendment argument is factbound, meritless, and does not implicate any conflict among the circuits; accordingly, it does not warrant this Court's review. This Court recently granted certiorari in two cases to address the proper interpretation of Section 924(c) and its prefatory "except" clause. The Court should therefore hold the petition in this case pending its decisions in those cases and then dispose of the petition accordingly.

1. Petitioner argues (Pet. 19-24) that the court of appeals incorrectly held that an officer may briefly prolong a traffic stop to ask questions unrelated to that stop without reasonable suspicion of criminal activity, and that this holding implicates an existing conflict among the circuits on the issue. Petitioner is wrong.

---

* The court of appeals also rejected petitioner's contention that the government had presented insufficient evidence that she had possessed the firearm "in furtherance of" the drug trafficking crime. Pet. App. 12-14. Petitioner does not renew that challenge before this Court.

The court of appeals' Fourth Amendment analysis is consistent with the decisions of this Court and the other courts of appeals. It is well established that an officer who stops a vehicle for a traffic violation may demand the driver's license, vehicle registration, and insurance papers, and question the motorist about the motorist's itinerary and purpose. See, *e.g.*, *Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005) (duration of a stop may be justified by "the ordinary inquiries incident to such a stop"); *Berkemer* v. *McCarty*, 468 U.S. 420, 437 (1984) (noting that a records check is an expected part of a traffic stop); *United States* v. *Brigham*, 382 F.3d 500, 507-508 & n.5 (5th Cir. 2004) (en banc) (citing cases from other circuits). An officer may also question a passenger to verify the information provided by the driver. See, *e.g.*, *United States* v. *Ward*, 484 F.3d 1059, 1061 (8th Cir. 2007); *Brigham*, 382 F.3d at 508. A police officer may extend a detention beyond what is necessary to effectuate the purpose of traffic stop if the driver consents, see, *e.g.*, *United States* v. *Sanchez-Pena*, 336 F.3d 431, 442-443 & n.60 (5th Cir. 2003) (noting the agreement among the circuits that a valid traffic stop can be extended by consent), or if the officer develops reasonable suspicion that the vehicle's occupants have engaged in illegal activity, see, *e.g.*, *United States* v. *Chavez Loya*, 528 F.3d 546, 553 (8th Cir. 2008); *United States* v. *Garrido-Santana*, 360 F.3d 565, 571 (6th Cir.), cert. denied, 542 U.S. 945 (2004); *United States* v. *Williams*, 271 F.3d 1262, 1267-1268 (10th Cir. 2001), cert. denied, 535 U.S. 1019 (2002).

As the court of appeals correctly recognized, the stop in this case fully complied with those rules. The trooper stopped petitioner for speeding and asked her for her driver's license, registration, and insurance. He decided

to issue petitioner a warning ticket, and while he "was in the process of writing the warning ticket," he asked petitioner about her itinerary and purpose. Pet. App. 7. After he finished writing up the ticket, he told petitioner she was free to leave, but then asked her if she would be willing to answer additional questions. *Id.* at 7-8. Petitioner consented and voluntarily answered the trooper's questions. *Id.* at 10. Her inconsistent and unusual answers to those questions gave the trooper reasonable suspicion that petitioner was involved in criminal activity. The trooper's subsequent questioning of Davis further supported that reasonable suspicion. *Id.* at 10-11. The trooper was therefore justified in detaining petitioner and Davis for an additional 11 minutes to await the arrival of a K-9 unit. *Id.* at 11.

Petitioner nonetheless argues (Pet. 20-22) that the decision below conflicts with a contrary rule in the Eleventh Circuit, exemplified by *United States* v. *Pruitt*, 174 F.3d 1215 (1999), that "a police stop cannot * * * last any longer than necessary to process the traffic violation." *Id.* at 1219 (internal quotation marks and citation omitted). Petitioner asserts that the other courts of appeals do not adhere to this "bright-line 'no prolongation rule,'" Pet. 21, and that the decision below also runs afoul of that rule because petitioner and Davis were detained after the trooper issued the warning ticket to await the arrival of a K-9 unit. As petitioner recognizes, however, see Pet. 20 n.8, the Eleventh Circuit noted in *Pruitt* that an officer may prolong a traffic stop for further questioning "if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring," or "if the initial detention has become a consensual encounter." 174 F.3d at 1220 (internal quotation marks and citation omitted); see *supra* p. 9 (citing cases

from other courts of appeals reaching the same conclusion). The court of appeals held that petitioner consented to further questioning in the trooper's vehicle after he issued her a warning ticket. The court also concluded that after that conversation and the trooper's questioning of Davis, the trooper had reasonable suspicion that petitioner and Davis were engaged in illegal activity. Accordingly, the officer justifiably detained petitioner and Davis pending the arrival of the K-9 unit consistent with the exceptions outlined in *Pruitt*, and any conflict between that case and cases from other courts of appeals is not implicated here.

Ultimately, petitioner's challenge to the decision below rests on her assertion that the court of appeals erroneously concluded that the trooper had reasonable suspicion that she and Davis were engaged in illegal activity. See Pet. 22-23. The court of appeals correctly determined, however, that petitioner's nervous behavior and highly suspicious statements, which conflicted with statements given by Davis, gave rise to reasonable suspicion of unlawful conduct. In any event, that factbound determination does not warrant this Court's review.

2. Petitioner contends (Pet. 15-18) that the prefatory "except" clause of 18 U.S.C. 924(c)(1)(A) should have exempted her from the mandatory five-year consecutive sentence for violating Section 924(c) because she also faced a ten-year mandatory minimum sentence for the underlying drug trafficking conviction. On January 25, 2010, this Court granted certiorari in *Abbott* v. *United States*, No. 09-479, and *Gould* v. *United States*, No. 09-7073, to address whether a defendant must receive a consecutive mandatory minimum sentence for violating Section 924(c) if he is also subject to a greater mandatory minimum sentence on another count of con-

viction arising out of the same criminal transaction. Accordingly, this petition should be held pending the Court's resolution of *Abbott* and *Gould*, and then disposed of as appropriate in light of the decisions in those cases.

CONCLUSION

On the first question presented, the petition for a writ of certiorari should be held pending the Court's decisions in *Abbott* v. *United States*, No. 09-479, and *Gould* v. *United States*, No. 09-7073, and disposed of as appropriate in light of those decisions. In all other respects, the petition should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN M. PELLETTIERI
Attorney

AUGUST 2010